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No. 05-1573

FILED

AUG 16 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

United States Supreme Court

PT PERTAMINA (PERSERO), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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ated: August 16, 2006

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. REPLY TO COUNTER-STATEMENT OF THE CASE	1
II. PERTAMINA HAS STANDING TO BRING THIS PETITION	3
III. THE COURT SHOULD GRANT THE PETITION TO REESTABLISH THE PRINCIPLES OF COMITY DISREGARDED BY THE COURTS BELOW	4
CONCLUSION	8
APPENDIX A— Excerpts of Transcript	1a

TABLE OF AUTHORITIES

Federal Cases *Page(s)*

Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694 (5th Cir. 1999) 6

Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212 (3d Cir. 2006) 6

Gen. Elec. Co. v. Deutz A.G., 270 F.3d 144 (3d Cir. 2001) 4

Glover v. U.S., 531 U.S. 198, 205, 121 S. Ct. 696 (2001) 3

Karaha Bodas Co., L.L.C. v. Pertamina, 313 F.3d 70 (2d Cir. 2002) 1

In re Trans. Chem. Ltd. and China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997) 6

Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765 (2000) 3

Petitioner Pertamina PT (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully submits this reply to the brief in opposition ("Opposition") filed by Respondent Karaha Bodas Company, L.L.C. ("Respondent" or "KBC").

I. REPLY TO COUNTER-STATEMENT OF THE CASE

In its Counter-Statement of the Case, KBC presents a misleading picture of the procedural background of the case, the involvement of the Ministry, and the arguments raised by Pertamina in connection with its defense of the enforcement proceedings initiated by KBC.

As a threshold matter, KBC mischaracterizes Pertamina's refusal to pay the arbitral award with "other people's" money as a general refusal to pay. Opposition at 9-11. Pertamina appreciates KBC's right to collect from Pertamina's own funds but has—properly—resisted paying with other funds. In fact, KBC has already collected approximately $55 million from Pertamina's funds in the United States.

Contrary to KBC's suggestion, Pertamina had every right to raise objections to KBC's attempts to execute on property that did not belong to Pertamina. In fact, the District Court repeatedly recognized the propriety of Pertamina's arguments. For example, with respect to the Retention Fee, the District Court noted that it was "not dealing with insignificant issues" and that "Pertamina was raising questions it had a right to raise." *See* March 4, 2005 Hearing Transcript at 4 (Reply App. at 1a).[1] Similarly, with respect

[1] As noted above, KBC failed on its primary argument with respect to the Retention Fee. *See Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70 (2d Cir. 2002) (denying KBC's appeal against dis-

to the Refinery Revenues, the Court stated that it accepted "most of what Pertamina and the [Ministry] have presented" on the Refinery Revenues issues, but drew a different legal "conclusion." *See* October 5, 2004 Hearing Transcript at 161-64 (Ministry's Pet. App. 58a-60a).

However, in reaching that legal "conclusion" with respect to the Refinery Revenues, the District Court and the Second Circuit accorded insufficient deference to the Indonesian Government's views of its own significant legal principles.

Moreover, the Ministry's involvement in the proceedings below was entirely appropriate, as would be the case for any party whose property is the subject of enforcement proceedings relating to the payment of the debt of a third party. In fact, both the Second Circuit and the District Court recognized this and excluded from execution a very significant portion of the property that KBC was attempting to restrain and execute against, on the ground that it was property of the Ministry and not the judgment debtor.

As KBC acknowledged (*see* Opposition at 6), the Second Circuit held that "all of the LNG Funds [or funds in the Adjudicated Accounts] except the Retention Fee was owned by Indonesia." Thus, since the Retention Fee was not more than 5% of the amount transferred to the Ministry, the vast majority of the funds in the Adjudicated Accounts that KBC attempted to execute against belonged to the Ministry.[2] Therefore, irrespective of the arguments

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trict court's decision that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage, part of which was the Retention Fee).

[2] The amounts restrained by Bank of America in the Adjudicated Accounts were approximately $503 million. In June of 2002, the New York Court ordered Bank of America to release $226 million and con-

raised in the Petition, the Ministry's intervention was warranted to protect its property.

II. PERTAMINA HAS STANDING TO BRING THIS PETITION

For the first time, KBC now argues that Pertamina lacks standing to contest the decisions of the District Court and the Second Circuit concerning ownership of the Refinery Revenues. Opposition at 18. This argument fails for several reasons.

First, KBC offers no support for its "lack of standing" argument. Indeed, the only authority that KBC cites, *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), simply stands for the general proposition that, under Article III of the Constitution, a party cannot bring an action in federal court unless that party has suffered "injury in fact." The facts of *Vermont Agency* do not resemble the facts of this case in any way. Further, KBC's conclusory assertion that "[t]he lower court decisions holding that Pertamina is the lawful owner of the Refinery Funds did not cause Pertamina injury" is not supported by any authority. Opposition at 18.

Second, KBC did not raise this argument below and, accordingly, should not be permitted to do so now. It is well settled that the Court will not reach an issue which is not raised, considered, or resolved in the court below but is raised for the first time on appeal. *See Glover v. U.S.*, 531 U.S. 198, 205, 121 S.Ct. 696, 701 (2001). KBC could have made this

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tinue to restrain $277 million on the theory that these funds were sufficient to cover the judgment entered by the Texas Court, along with interest. Pet. App. 72a. Of the $277 million that continued to be restrained, only a small portion comprised Retention Fees, and the balance belonged to the Government. *Id.* at 74a.

argument before the Second Circuit when Pertamina sought review of the District Court's Final Judgment. It did not and its failure to do so is fatal in that regard.

Finally, even if the Court could consider KBC's argument in deciding this petition, the argument is meritless. KBC is urging the proposition that a judgment debtor cannot raise the argument that property subject to execution belongs to a third party. Of course, KBC offers no support for such a proposition. Moreover, such a proposition makes no sense, because a judgment debtor in such circumstances would be exposed to claims from such third party, and, therefore, injury-in-fact. Accordingly, the judgment debtor has every right to contest execution against such funds.

III. THE COURT SHOULD GRANT THE PETITION TO REESTABLISH THE PRINCIPLES OF COMITY DISREGARDED BY THE COURTS BELOW

In the Petition, Pertamina argued that to achieve the "worthy goals of comity[,]" *Gen. Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001), federal courts should grant very substantial deference to a foreign sovereign's determination of the content of its own laws. Pertamina also noted that federal courts have accorded "substantial deference" to the "construction" a foreign sovereign "places upon its domestic law" when the foreign sovereign is a litigant. *See* Petition at 11-12. In fact, as Pertamina pointed out and KBC concedes, the Second Circuit in an earlier opinion in this case at least purported to recognize the principle of deference to the position of a foreign sovereign in connection with the interpretation of that sovereign's laws. *See* Petition at 12 and Pet. App. 128-129a; Opposi-

tion at 15-16. However, the Second Circuit, in its summary decision, failed to apply, or even take into consideration, these principles and, as a result, reached a conclusion that is at odds with well-established international legal principles in the context of litigation involving foreign sovereigns. To assure comity its proper role, this Court should clarify the degree of deference owed to the views of a foreign sovereign in such circumstances.

KBC has offered no persuasive argument to the contrary. Indeed, KBC contends that the Second Circuit "conducted painstaking examinations of each of the Indonesian laws relied upon by Pertamina and the [Ministry]," although it fails to point out any part of the Second Circuit's summary decision reflecting such "painstaking examination." Opposition at 12. The fact is that the Second Circuit disregarded Indonesian law in holding that Pertamina owned the Refinery Revenues because they constituted "property within Pertamina's control, which only Pertamina controls." Pet. App. 5a.

Likewise, KBC misses the point with respect to the Second Circuit's misconstruction of Indonesian law insofar as it found that "Indonesia acts like a guarantor of Pertamina's BBM operation." *See* Pet. App. 5a. KBC argues that the concept of guarantee is recognized under Indonesian law. *See* Opposition at 17. Whether or not that is true, it is irrelevant to the analogy drawn by the Second Circuit. As explained in the Petition, the reason that the Government cannot act "like a guarantor" for the BBM operation is because, under Indonesian law, the Government owns the Refinery Revenues.

Equally unpersuasive is KBC's argument concerning the authority of district courts to interpret foreign law. *See* Opposition at 14-16. The cases cited by KBC in support of its argument that "Rule 44.1 vests district courts with broad authority to determine foreign law" did not involve a foreign sovereign itself offering an interpretation of its domestic laws (which in this case effectuate an important public policy). For example, *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212 (3d Cir. 2006), involved an action by a consignee against a foreign-flagged cargo ship, a shipping company, and a charterer cargo damage. Likewise, *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694 (5th Cir. 1999), involved a dispute between private telecommunications companies and the Court of Appeals for the Fifth Circuit recognized that because of "the difficulty of interpreting foreign law, courts may defer to foreign government interpretations." *Id.* at 714.[3]

KBC does not even purport to respond to the important comity-based argument advanced by Pertamina in support of its Petition as to the significance of ensuring that substantial deference is accorded to a foreign sovereign's interpretation of its domestic laws. The core of Pertami-

[3] In the other case cited by KBC for this proposition, *In re Trans. Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997), while the determination of foreign law with respect to the status of an entity as the foreign government's agency or instrumentality pursuant to the Foreign Sovereign Immunities Act was an issue, the foreign government did not present its views regarding its domestic laws. Pertamina does not dispute that Rule 44.1 enables district courts to conduct an independent review of foreign law in most cases. What it does argue, however, is that when a foreign government offers its own interpretation of its domestic laws, then that interpretation should be afforded substantial deference, and far greater deference than was accorded here.

na's argument is that under the principles of comity, and, in particular, reciprocity, the United States would and should expect that a foreign court hearing an issue regarding U.S. regulation, adopted to support an important national policy, would afford substantial deference to the views expressed by representatives of the U.S. Government with respect to the proper operation and construction of such regulation. The Second Circuit's summary decision ignored these principles and, during a critical period for U.S. foreign policy, opened the door for foreign courts to ignore the U.S. Government's views regarding U.S. laws. This Court should therefore step in and clarify the degree of deference that should be accorded to a sovereign state's construction of its own significant legislation and regulation.

CONCLUSION

For all of the foregoing reasons and the reasons articulated in the Petition, Pertamina respectfully requests that the Court grant certiorari review and reverse the decision below.

Respectfully submitted,

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August 16, 2006